BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LORETHA M. LOYD	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,020,272
ACME FOUNDRY, INC.	)	
Self-Insured Respondent	)	

ORDER

Respondent appealed the January 28, 2008, Award entered by Administrative Law Judge Thomas Klein. The Workers Compensation Board heard oral argument on April 15, 2008.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Paul M. Kritz of Coffeyville, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for bilateral upper extremity injuries. In the January 28, 2008, Award, Judge Klein awarded claimant permanent total disability benefits. The Judge stated, in part:

> The Court finds the opinion of Dr. Prostic that the Claimant is essentially and realistically unemployable to be persuasive. The Court finds that the Claimant is permanently and totally disabled. The Court is influenced heavily by the uncontroverted evidence that the Claimant is low functioning. While the Claimant was able to function in the workforce prior to her injury, the Court believes she has attempted a good faith job search, with assistance from professionals, to become

> employed. This factor, combined with her low function, convinces the Court that the Claimant is permanently and totally disabled.[1]

Respondent contends Judge Klein erred. Respondent argues claimant does not qualify for permanent total disability benefits. First, respondent notes the permanent total disability statute states that such disability "exists when the employee, *on account of the injury*, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment,"[2] not "on account of the injury, *and the employee's pre-existing mental deficits, lack of transferrable job skills, etc.*"[3] Secondly, respondent asserts claimant is capable of working or, in other words, engaging in substantial and gainful employment.

Respondent also argues claimant is not entitled to permanent disability benefits under K.S.A. 44-510e for her scars, or purported skin impairment, because (1) claimant has sustained scheduled injuries only and (2) but for her misconduct, claimant's employment with respondent would have continued and, thus, she would not have experienced any wage loss. Therefore, respondent contends claimant should receive permanent disability benefits under the schedule of K.S.A. 44-510d for her 7.7 percent functional impairment to each upper extremity as determined by Dr. J. Mark Melhorn. In short, respondent requests the Board to modify and reduce the January 28, 2008, Award.

Conversely, claimant contends the Award should be affirmed. Claimant argues there is a presumption she is permanently and totally disabled, which respondent has not rebutted. Moreover, regardless of such presumption, claimant argues the evidence establishes she is permanently and totally disabled. In the alternative, claimant argues her bilateral upper extremity surgical scarring removes her injuries from the schedule of K.S.A. 44-510d and, therefore, her permanent partial disability benefits should be calculated under K.S.A. 44-510e. And for that reason, claimant argues she was wrongfully terminated by respondent in retaliation for pursuing this workers compensation claim and that she has made a good faith effort to find other employment. Accordingly, claimant argues she has a 100 percent wage loss and a 36 percent task loss for a 68 percent work disability.

The sole issue on this appeal is the nature and extent of claimant's injuries and disability.

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[1] ALJ Award (Jan. 28, 2008) at 4.

[2] Respondent's Brief at 9 (filed March 6, 2008).

[3] *Id.*

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

The parties stipulated claimant injured both upper extremities while working for respondent. Moreover, the parties agreed November 4, 2004, was the appropriate date of accident for calculating claimant's benefits for her repetitive trauma injuries.

Respondent is a foundry that makes cores for transmissions. After working for several years in respondent's core room, claimant began developing bilateral upper extremity symptoms. Before joining respondent in March 1997, claimant was a school bus driver for more than a year, a warehouse clerk for two years, and a forklift operator for three years. Claimant's testimony is uncontradicted she did not have any upper extremity symptoms before she began working for respondent.

As a result of her work injuries, claimant underwent multiple bilateral carpal tunnel release surgeries (three surgeries on the right wrist and one on the left wrist) and ulnar release surgeries at both elbows. And those injuries have adversely affected claimant's ability to work and find employment. Claimant has not worked since respondent terminated her in December 2005 as she has been unable to find another job in Southeast Kansas. When the record closed, claimant was 45 years old, unemployed, and living on state assistance.

Claimant's bilateral upper extremity injuries have left her with permanent impairment in both arms. When claimant initiated this claim, bilateral upper extremity injuries were considered outside the schedule of K.S.A. 44-510d and, therefore, the permanent partial disability from those injuries was determined under K.S.A. 44-510e. During litigation of the claim, however, the Kansas Supreme Court released its *Casco*[4] decision in which the Kansas Supreme Court set aside 75 years of precedent and drastically changed the manner in which bilateral upper extremity injuries were treated under the Workers Compensation Act. In *Casco*, the Kansas Supreme Court held that bilateral upper extremity injuries would create a presumption of permanent and total disability but if the presumption was rebutted the injured worker would be compensated for separate scheduled injuries under K.S.A. 44-510d.

[4] *Casco v. Armour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494, *reh'g denied* (2007).

Medical expert and vocational expert opinion before *Casco*

Because of the *Casco* decision, this claim was litigated in two separate stages under two different trial strategies. Before the *Casco* decision was released, claimant sought to prove she had a wage loss and task loss for the permanent partial disability formula set forth in K.S.A. 44-510e. Accordingly, claimant presented the testimony of both her medical expert witness, board-certified orthopedic surgeon Dr. Edward J. Prostic, who examined claimant in July 2005 and May 2006, and her vocational expert, Karen Crist Terrill.

During the initial stage of the litigation, Dr. Prostic testified claimant had a 20 percent impairment to each upper extremity, which when combined comprised a 23 percent whole person functional impairment, pursuant to the AMA *Guides*.[5] The doctor recommended that claimant avoid repetitive or forceful gripping with either hand, frequent use of a keyboard, frequent handwriting, and impact tools.[6] Moreover, the doctor determined claimant lost the ability to perform 36 percent of the tasks that Ms. Terrill found claimant had performed in the 15-year period before she sustained these bilateral upper extremity injuries. Although the doctor would later testify he felt claimant was essentially unemployable, he initially believed claimant retained the ability to work.

Moreover, Ms. Terrill initially concluded claimant retained the ability to work. Indeed, Ms. Terrill's initial evaluation revealed claimant was a 1981 high school graduate, an average student, and had completed courses in shop, typing and sewing. In addition, Ms. Terrill noted claimant had experience or skills as a warehouse clerk, reading blueprints, operating machines used in manufacturing products, operating a forklift, and at one point in time had a chauffeur's license. And although she would later testify claimant was essentially unemployable, Ms. Terrill initially testified claimant could expect to earn $7 per hour as claimant retained the ability to perform some production jobs and some security work.

Medical expert and vocational expert opinion after *Casco*

After the Kansas Supreme Court released *Casco*, claimant changed her trial strategy. Part of that change included obtaining intelligence and achievement testing from a school psychologist, Mary Sylvester. In early May 2007, Ms. Sylvester tested claimant. The test results revealed, among other things, that claimant's broad reading skills were equivalent to those of a third grade student, her broad math skills were equivalent to those

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[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[6] Prostic Depo. (Feb. 26, 2007) at 15.

of a fourth grade student, and her broad written language skills were equivalent to those of a second grade student. On the other hand, individual subtests indicated claimant scored highest in such areas as letter-word identification (fifth grade), calculation (fifth grade), applied problems (fourth grade), picture vocabulary (eighth grade), reading vocabulary (fifth grade), and quantitative concepts (fifth grade).

The intelligence test administered by Ms. Sylvester indicated claimant had a standard score of 82. According to Ms. Sylvester, if claimant were in school today that score might place claimant in the category of a learning disabled student and entitle her to receive such aids as a resource room, tutor, or special paraprofessional. In summary, Ms. Sylvester would place claimant in the very low average category. Nonetheless, claimant scored average in quantitative reasoning, which included mathematical problem-solving abilities. And more importantly, Ms. Sylvester testified claimant's lower intelligence level did not render her unable to work:

> Q. (Mr. Kritz) Given her level of intelligence, do you have an opinion as to whether the claimant is capable of engaging in any type of substantial and gainful employment?
>
> A. (Ms. Sylvester) My opinion would be that it would have to be on her intellectual ability level, she would have to be able to understand. It would have to be a fairly concrete situation. It would have to not involve much fluid reasoning. Her fluid reasoning ability is one of her lower level subtests on the intelligence test. It could not -- her ability to recognize generally accepted or known things in the environment would have to be fairly limited because knowledge and understanding of the world around her is actually her lowest subtest score.[7]

Armed with the test results provided by Ms. Sylvester, claimant sought additional opinions from Dr. Prostic and Ms. Terrill. At the doctor's second deposition, Dr. Prostic testified he believed claimant was realistically unemployable after considering her educational background, work history, work restrictions, achievement test results, and intelligence test results. In addition, the doctor modified his opinion regarding claimant's functional impairment and added a one percent whole body impairment for painful scars in her palms. At his first deposition, however, Dr. Prostic indicated claimant had a tender scar in her left palm, which he expected to resolve.[8]

Ms. Terrill testified at her second deposition that she felt claimant was not employable after considering the test results obtained by Ms. Sylvester. According to

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[7] Sylvester Depo. at 48, 49.

[8] Prostic Depo. (Feb. 26, 2007) at 25.

Ms. Terrill, claimant's bilateral upper extremity injuries eliminated a wide variety of jobs and claimant's lack of academic achievement eliminated even more. Although claimant had performed warehouse work in the past, Ms. Terrill concluded Dr. Prostic's work restrictions and claimant's reading skills would eliminate that type of job. Likewise, Ms. Terrill testified at her second deposition that claimant's work restrictions would prevent her from working as a forklift operator and that claimant would not be able to work as a production technician that might involve paperwork.

On the other hand, respondent presented the testimony of Dr. J. Mark Melhorn. Dr. Melhorn, who in early 2006 performed the last carpal tunnel release surgeries on claimant and the bilateral ulnar nerve decompression surgeries on her elbows, rated claimant under the AMA *Guides* as having a 7.7 percent impairment to each upper extremity, which convert to a 9.2 percent whole person impairment. Dr. Melhorn concluded claimant should be restricted from lifting and carrying greater than 50 pounds using both arms, she should avoid extended periods of power and vibratory tools, and she should limit grasping, gripping and repetitive tasks to two hours or less per three-hour period.

Moreover, Dr. Melhorn testified he did not believe claimant's injuries had rendered her unable to work. Dr. Melhorn did not believe claimant had an impairment to her skin other than at the incision sites, which he included under the sensory and strength loss component of his rating.[9] According to Dr. Melhorn, incision scars are not routinely the basis for impairment as the skin section of the AMA *Guides* is intended to address such things as burns or open wounds. He does not believe that scar tissue by itself comprises an impairment.

Respondent's vocational expert, Michael J. Dreiling, also testified that claimant retained the ability to work. Ms. Sylvester's testing and data did not change Mr. Dreiling's opinion that claimant retains the ability to earn $8 to $9 per hour as claimant's potential job market lies in the unskilled to semi-skilled categories. Moreover, Mr. Dreiling noted that claimant's work history indicated she functioned better than the testing results indicated.

Although claimant has sustained significant bilateral upper extremity injuries, the Board finds she retains the ability to work and earn from $7 to $9 per hour. Indeed, after leaving respondent's employment claimant was offered two jobs paying $12 per hour. Unfortunately, neither of those jobs panned out as one of the potential employers determined she was not needed after she had completed both a drug test and orientation and being issued a badge, and the other potential employer told her it would contact her

[9] Melhorn Depo. at 18, 19.

about starting work but it then hired another individual. Mr. Dreiling's opinion is persuasive that claimant's test results are inconsistent with her work history and that she retains the ability to perform entry level unskilled and semi-skilled labor.

Although claimant may not be able to restrain individuals, as a practical matter she retains the ability to perform security work that would not require her to confront individuals. And although she may not have the wherewithal to work as a bank teller or perform data entry, she has the ability to handle money and count change. Moreover, she retains the ability to operate a forklift and perform other warehouse work, depending upon the specific requirements of the job. She also retains the ability to be a machine operator, again depending upon the requirement of the specific machine. Although claimant's labor market has been diminished by her bilateral upper extremity injuries, the Board finds there are jobs that she can perform within her physical and mental capabilities.

Next, the Board finds claimant sustained a 20 percent upper extremity impairment to each upper extremity, which are the functional impairment ratings first provided by Dr. Prostic. The Board is not persuaded that claimant has a separate impairment from her surgical incisions. And in any event, such skin impairment would not remove these injuries from the schedule of K.S.A. 44-510d as the scars are located on claimant's upper extremities and any impairment created by those scars would be compensated as an injury to the extremity.[10] In other words, any impairment to the skin on the upper extremities would be considered as an impairment to that particular part of the body.

CONCLUSIONS OF LAW

As indicated above, the *Casco* decision holds that bilateral upper extremity injuries create the presumption that a worker is permanently and totally disabled and when that presumption is rebutted the injured worker's permanent disability benefits for each upper extremity are determined under the schedule of K.S.A. 44-510d. Accordingly, the issues surrounding claimant's termination, whether she made a good faith effort to find other employment, and the amount of her wage loss and task loss are moot. Such is the effect of *Casco*.

The Board finds that the presumption of a permanent total disability is rebutted and that claimant sustained a 20 percent impairment to each upper extremity. Accordingly, claimant is entitled to receive permanent disability benefits based upon those functional impairment ratings for two scheduled injuries under K.S.A. 44-510d.

[10] See *Bryant v. Excel Corp.*, 239 Kan. 688, 722 P.2d 579 (1986) and *Fogle v. Sedgwick County*, 235 Kan. 386, 680 P.2d 287 (1984).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[11] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the January 28, 2008, Award entered by Judge Thomas Klein, as follows:

Right Arm

Loretha M. Loyd is granted compensation from Acme Foundry, Inc., for a November 4, 2004, accident and resulting disability. Based upon an average weekly wage of $520.55, Ms. Loyd is entitled to receive 42 weeks of permanent partial disability benefits at $347.05 per week, or $14,576.10, for a 20 percent permanent partial disability to the right arm, making a total award of $14,576.10, which is all due and owing less any amounts previously paid.

Left Arm

Loretha M. Loyd is granted compensation from Acme Foundry, Inc., for a November 4, 2004, accident and resulting disability. Based upon an average weekly wage of $520.55, Ms. Loyd is entitled to receive 42 weeks of permanent partial disability benefits at $347.05 per week, or $14,576.10, for a 20 percent permanent partial disability to the left arm, making a total award of $14,576.10, which is all due and owing less any amounts previously paid.

The record does not contain a written fee agreement between claimant and her attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. **Before claimant's counsel retains any fee in this matter, counsel must submit the written agreement to the Judge for approval as required by K.S.A. 44-536.** The provision in the Award approving claimant's contract is set aside.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

[11] K.S.A. 2007 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this ____ day of May, 2008.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Paul M. Kritz, Attorney for Respondent
Thomas Klein, Administrative Law Judge